

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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I.J.B. by and through his guardian ad litem
Jennifer Butler,

Case No. 2:17-cv-02890-GMN-DJA

Plaintiff.

REPORT AND RECOMMENDATION

V.

NANCY A. BERRYHILL, Commissioner of
Social Security,

Defendant.

This matter was referred to the undersigned magistrate judge for a report of findings and recommendations under 28 U.S.C. § 636(b)(1)(B)-(C) and Local Rule IB 1-4. The case involves review of an administrative action by the Commissioner of Social Security (“Commissioner”) denying Plaintiff I.J.B.’s (“Plaintiff”) application for supplemental security income pursuant to Title XVI of the Social Security Act, 42 U.S.C. Ch. 7. The Court has reviewed Plaintiff’s Motion for Reversal or to Remand (ECF No. 16), filed March 24, 2018, and the Commissioner’s Response and Cross-Motion to Affirm (ECF Nos. 18-19), filed April 23, 2018. Plaintiff did not file a Reply.

I. BACKGROUND

1. Procedural History

On February 4, 2013, an application for supplemental security income was protectively filed on Plaintiff's behalf, alleging an onset date of October 1, 2012. AR¹ 220-228. Plaintiff's claim was denied initially, and on reconsideration. AR 107-108. A hearing was held before an

¹ AR refers to the Administrative Record in this matter. (Notice of Manual Filing (ECF No. 12).)

1 Administrative Law Judge (“ALJ”) on July 2, 2015. AR 73-96. On March 21, 2016, the ALJ
2 issued a decision denying Plaintiff’s claim. AR 32-58. The ALJ’s decision became the
3 Commissioner’s final decision when the Appeals Council denied review on September 15, 2017.
4 AR 2-7. Plaintiff commenced this action for judicial review under 42 U.S.C. §§ 405(g) on
5 November 17, 2017. (*See Motion/Application for Leave to Proceed in forma pauperis.* (ECF No.
6 1).)

7 **2. The ALJ Decision**

8 The ALJ followed the three-step sequential evaluation process set forth in 20 C.F.R. §§
9 416.924 for child disability cases. AR 32-58. She found Plaintiff was a school-age child on
10 February 4, 2013, the date the application was filed, and an adolescent as of the date of the
11 decision. AR 38. At step one, the ALJ found that Plaintiff had not engaged in substantial gainful
12 activity since the application date. *Id.* At step two, the ALJ found that Plaintiff has the following
13 severe impairments: attention deficit hyperactivity disorder, history of a cognitive disorder not
14 otherwise specified, and history of a learning disorder not otherwise specified. *Id.* She also
15 found a speech disorder and encopresis were not medically determinable impairments. At step
16 three, the ALJ determined that Plaintiff did not have an impairment or combination of
17 impairments that met or medically equaled the severity of one of the listed impairments in 20
18 C.F.R. Part 404, Subpart P, Appendix 1, and did not have an impairment or combination of
19 impairments that functionally equals the severity of the listings. AR 39. For the six functional
20 equivalence domains, the ALJ found Plaintiff to have less than marked limitation in acquiring and
21 using information, less than marked limitation in attending and completing tasks, no limitation in
22 interacting and relating to others, no limitation in moving about and manipulating objects, no
23 limitation in caring for yourself, and less than marked limitation in health and physical well-
24 being. AR 46-54. Accordingly, the ALJ concluded that Plaintiff has not been disabled since
25 February 4, 2013. AR 54.

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1 **II. DISCUSSION**

2 **1. Standard of Review**

3 Administrative decisions in social security disability benefits cases are reviewed under 42
 4 U.S.C. § 405(g). *See Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section 405(g)
 5 states: “Any individual, after any final decision of the Commissioner of Social Security made
 6 after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a
 7 review of such decision by a civil action . . . brought in the district court of the United States for
 8 the judicial district in which the plaintiff resides.” The court may enter “upon the pleadings and
 9 transcripts of the record, a judgment affirming, modifying, or reversing the decision of the
 10 Commissioner of Social Security, with or without remanding the cause for a rehearing.” *Id.* The
 11 Ninth Circuit reviews a decision affirming, modifying, or reversing a decision of the
 12 Commissioner de novo. *See Batson v. Comm'r*, 359 F.3d 1190, 1193 (9th Cir. 2004).

13 The Commissioner’s findings of fact are conclusive if supported by substantial evidence.
 14 *See* 42 U.S.C. § 405(g); *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005). However, the
 15 Commissioner’s findings may be set aside if they are based on legal error or not supported by
 16 substantial evidence. *See Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir.
 17 2006); *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). The Ninth Circuit defines
 18 substantial evidence as “more than a mere scintilla but less than a preponderance; it is such
 19 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
 20 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995); *see also Bayliss v. Barnhart*, 427 F.3d
 21 1211, 1214 n.1 (9th Cir. 2005). In determining whether the Commissioner’s findings are
 22 supported by substantial evidence, the court “must review the administrative record as a whole,
 23 weighing both the evidence that supports and the evidence that detracts from the Commissioner’s
 24 conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *see also Smolen v. Chater*, 80
 25 F.3d 1273, 1279 (9th Cir. 1996).

26 Under the substantial evidence test, findings must be upheld if supported by inferences
 27 reasonably drawn from the record. *Batson*, 359 F.3d at 1193. When the evidence will support
 28 more than one rational interpretation, the court must defer to the Commissioner’s interpretation.

1 See *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *Flaten v. Sec'y of Health and Human*
 2 *Serv.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Consequently, the issue before the court is not whether
 3 the Commissioner could reasonably have reached a different conclusion, but whether the final
 4 decision is supported by substantial evidence. It is incumbent on the ALJ to make specific
 5 findings so that the court does not speculate as to the basis of the findings when determining if the
 6 Commissioner's decision is supported by substantial evidence. Mere cursory findings of fact
 7 without explicit statements as to what portions of the evidence were accepted or rejected are not
 8 sufficient. *Lewin v. Schweiker*, 654 F.2d 631, 634 (9th Cir. 1981). The ALJ's findings "should
 9 be as comprehensive and analytical as feasible, and where appropriate, should include a statement
 10 of subordinate factual foundations on which the ultimate factual conclusions are based." *Id.*

11 **2. Disability Evaluation Process**

12 For an individual under eighteen years of age to be considered disabled for the purpose of
 13 receiving benefits, he must suffer from a "medically determinable physical or mental impairment,
 14 which results in marked and severe functional limitations, and which can be expected to result in
 15 death or which has lasted or can be expected to last for a continuous period of not less than 12
 16 months." 42 U.S.C. § 1382c(a)(3)(C)(i). An impairment meets this requirement if it meets or
 17 equals in severity any impairment that is listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 (the
 18 "listings"). 20 C.F.R. § 416.924(d).

19 The Regulations promulgated by the Social Security Administration establish a three-step
 20 sequential evaluation process for child disability cases. See 20 C.F.R. § 416.924. At step one, the
 21 relevant inquiry is whether the child is engaged in substantial gainful activity. 20 C.F.R. §
 22 416.924(a). If so, no disability exists, and the claim is denied. 20 C.F.R. § 416.924(b). If the
 23 child is not engaged in substantial gainful activity, the fact finder then determines whether the
 24 child has a medically determinable impairment or combination of impairments that is severe. 20
 25 C.F.R. § 416.924(a). If the impairment is a "slight abnormality or a combination of slight
 26 abnormalities that causes no more than minimal functional limitations," the Commissioner will
 27 find that the impairment is not severe and will deny the child's claim. 20 C.F.R. § 416.924(c).

1 If the child has a severe impairment, the third and final step assesses whether the
 2 impairment meets or medically or functionally equals in severity an impairment in the listings.
 3 20 C.F.R. § 416.924(d). If the impairment meets or equals the requirements of a listing, the child
 4 will be found disabled, assuming that the 12-month duration requirement is also met. *Id.* A
 5 child's impairment "is medically equivalent to a listed impairment . . . if it is at least equal in
 6 severity and duration to the criteria of any listed impairment." 20 C.F.R. § 416.926(a). To
 7 establish medical equivalence, "a claimant must establish symptoms, signs and laboratory
 8 findings 'at least equal in severity and duration' to the characteristics of a relevant listed
 9 impairment." *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999) (quoting 20 C.F.R. §
 10 404.1526).

11 To determine whether a child's severe impairment functionally equals a listed impairment,
 12 the Commissioner assesses all of the functional limitations caused by the child's impairment in
 13 six domains: (1) acquiring and using information; (2) attending and completing tasks; (3)
 14 interacting and relating with others; (4) moving about and manipulating objects; (5) caring for
 15 oneself; and (6) health and physical well-being. 20 C.F.R. § 416.926a(a)-(b). To functionally
 16 equal a listed impairment, a child's impairment must result in "marked" limitations in two
 17 domains or an "extreme" limitation in one domain. 20 C.F.R. § 416.926a(a). A "marked"
 18 limitation is one that "interferes seriously with [the child's] ability to independently initiate,
 19 sustain, or complete activities." 20 C.F.R. § 416.926a(e)(2)(i). It is "more than moderate" but
 20 "less than extreme." *Id.* A child's "day-to-day functioning may be seriously limited when [his]
 21 impairment(s) limits only one activity or when the interactive and cumulative effects of [his]
 22 impairment(s) limit several activities." *Id.* An "extreme" limitation "interferes very seriously
 23 with [the child's] ability to independently initiate, sustain, or complete activities." 20 C.F.R. §
 24 416.926a(e)(3)(i). It is the rating given to "the worst limitations." *Id.*

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1 **3. Analysis**

2 **a. Whether the ALJ Properly Weighed Ms. McKoy's Opinion Given New
3 Evidence Submitted to the Appeals Council**

4 The ALJ accorded the opinion of Kerry McKoy, Plaintiff's school counselor during
5 lunchtime and transitions, little weight because it was contradicted by the rest of the record. Ms.
6 McKoy's opinion was that Plaintiff experienced serious problems in the domains of: (1) acquiring
7 and using information, (2) attending and completing tasks, and (3) interacting and relating to
8 others. AR 46. The ALJ noted it was contradicted by subsequent statements of Plaintiff's mother
9 to doctors that indicated Plaintiff was functioning normally at school academically and socially,
10 his ADHD symptomatology had improved on prescribed Ritalin, and he had age-appropriate
11 relationships with friends. *Id.* The ALJ also underscored how Ms. McKoy's opinion was
12 contradicted by the well supported and uncontroverted medical opinion evidence of the record
13 and his repeated presentation during examination as pleasant, cooperative, and able to interact
14 appropriately with physicians and clinicians. *Id.* Further, the ALJ provided a thorough summary
15 of the medical evidence of record and other opinion evidence along with an explanation for the
16 weight assigned to the other opinion evidence. AR 40-46.

17 Plaintiff argues that the ALJ's reasons for giving little weight to Ms. McKoy's opinion are
18 not supported by substantial evidence. (ECF No. 16, 8-12). He argues that her lay opinion was
19 supported by the new evidence submitted to the Appeals Council that indicates Plaintiff's
20 symptoms had not improved, as suggested by the ALJ's decision. (*Id.* at 9). Specifically,
21 Plaintiff points to the Teacher Questionnaire submitted by Stephanique Stewart that opined
22 Plaintiff had a serious problem expressing ideas in written form and recalling and applying
23 previously learned material. (*Id.* at 10). Additionally, Ms. Stewart opined that Plaintiff had a
24 very serious problem in all but one subsection of the attending and completing tasks domain.
25 (*Id.*) She also opined that he had an obvious problem in the ability to ask permission
26 appropriately and following classroom rules. (*Id.*) Ms. Stewart also identified serious problems
27 for cooperating in or being responsible for, taking needed medications and being patient when
28 necessary and taking care of personal hygiene. (*Id.*) As such, Plaintiff contends that Ms.

1 Stewart's opinion contradicts the ALJ's decision as Ms. Stewart's lay opinion is consistent with
2 Dr. Zucker's observations, whose opinion the ALJ utilized to reject Ms. McKoy's opinion. (*Id.* at
3 12). Plaintiff further argues that Dr. Jaffee's opinion that indicated less than marked to no
4 restrictions in all domains should not have been weighed more than Ms. McKoy's opinion
5 because she observed Plaintiff for an entire school year before providing her opinion. (ECF No.
6 16, 12). Similarly, Plaintiff highlights the fact that the non-examining State agency physicians
7 did not have the benefit of examination and only reviewed the documents in the file to issue their
8 opinions. (*Id.*) Therefore, Plaintiff contends that Ms. Stewart's opinion is new and material
9 evidence that warrants finding the ALJ lacked substantial evidence for rejecting Ms. McKoy's
10 opinion.

11 The Commissioner argues that the ALJ properly evaluated the functional impact of
12 Plaintiff's impairments and substantial evidence supports her decision to accord Ms. McKoy's
13 opinion little weight. (ECF No. 18, 4). The Commissioner notes that Ms. McKoy falls into the
14 category of other sources, which is not generally accorded the same deference as an acceptable
15 medical source. *See Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). However, the
16 Commissioner argues that the ALJ properly considered it in accordance with SSR 06-03p, which
17 was in effect during the ALJ's decision. (ECF No. 18, 5). In fact, the Commissioner notes that
18 the ALJ gave several reasons for assigning little weight to Ms. McKoy's opinion, including that it
19 was contradicted by treatment notes indicating improvement on medication and mother's
20 statements that Plaintiff was doing well at school. (*Id.*) Further, the Commissioner contends that
21 even Ms. McKoy's letters in February and May of 2013 noted improvement with Plaintiff's use
22 of Ritalin. (*Id.* at 6). Additionally, the Commissioner highlighted the mental status examinations
23 that showed normal or some restlessness from Plaintiff. (*Id.*) Further, the Commissioner pointed
24 to Plaintiff's daily activities and other opinions from medical sources including the testifying
25 medical expert Dr. Jaffee as contradicting Ms. McKoy's opinion.

26 Plaintiff fails to explain how the ALJ's assignment of weight and explanation for the other
27 opinions in the record was faulty, but rather asks this Court to make a different finding based on
28 the new opinion of Ms. Stewart supporting Ms. McKoy's lay opinion. Simply pointing to some

1 potentially contrary evidence in the record does not suffice to show that an ALJ's decision is not
2 supported by substantial evidence. *Cf. Shaibi v. Berryhill*, 883 F.3d 1102, 1108 (9th Cir. 2017).
3 It is for the ALJ to evaluate the record before him and make reasonable conclusions therefrom.
4 *See, e.g., Burch*, 400 F.3d at 679 ("Where evidence is susceptible to more than one rational
5 interpretation, it is the ALJ's conclusion that must be upheld"). While Plaintiff would have
6 preferred the ALJ interpret the record differently and accord Ms. McKoy's opinion more weight,
7 he has failed to show that the ALJ was required to do so.

8 In fact, Plaintiff has not established that the new evidence materially affects the matter in
9 dispute under 42 U.S.C. § 405(g). Remand is warranted only if there is new evidence that is
10 material and good cause exists for the late submission of the evidence. New evidence is material
11 when it "'bear[s] directly and substantially on the matter in dispute,' and if there is a 'reasonabl[e]
12 possibility that the new evidence would have changed the outcome of the . . . determination.'"'
13 *Bruton v. Massanari*, 268 F.3d 824, 827 (9th Cir. 2001) (quoting *Booz v. Sec'y of Health &*
14 *Human Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984)). Here, the ALJ provided a thorough
15 explanation for assigning little weight to Ms. McKoy's lay opinion with citation to contrary
16 testimony, opinion evidence, and medical evidence of record. For instance, she relied on contrary
17 statements of Plaintiff's mother, treatment records, Plaintiff's reported activities of daily living,
18 and examination records. AR 46. Therefore, the Court finds that substantial evidence supports
19 the ALJ's assignment of little weight to the lay opinion of Ms. McKoy.

20 **III. CONCLUSION AND RECOMMENDATION**

21 Judicial review of the Commissioner's decision to deny disability benefits is limited to
22 determining whether the decision is free from legal error and supported by substantial evidence.
23 It is the ALJ's responsibility to make findings of fact, draw reasonable inferences from the record,
24 and resolve conflicts in the evidence, including differences of opinion. Having reviewed the
25 Administrative Record as a whole and weighed the evidence that supports and detracts from the
26 conclusion, the Court finds that the ALJ's decision is supported by substantial evidence under 42
27 U.S.C. § 405(g) and that the ALJ did not commit legal error.

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1 Accordingly, IT IS HEREBY RECOMMENDED that Plaintiff's Motion to Remand (ECF
2 No. 16) be **denied**.

3 IT IS FURTHER RECOMMENDED that the Commissioner's Cross-Motion to Affirm
4 (ECF No. 18) be **granted**.

5 **IV. NOTICE**

6 This report and recommendation is submitted to the United States district judge assigned
7 to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation
8 may file a written objection supported by points and authorities within fourteen days of being
9 served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely
10 objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d
11 1153, 1157 (9th Cir. 1991).

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13 DATED: November 7, 2019

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16 DANIEL J. ALBREGTS
17 UNITED STATES MAGISTRATE JUDGE

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